

**OPINION
66-90**

May 4, 1966 (OPINION)

Mr. Wallace D. Berning

Assistant State's Attorney

Ward County

RE: Elections - Petitions - Average Vote

This is in reply to your letter dated May 2, 1966, requesting an opinion of this office supplementary to an opinion issued to you dated April 27, 1966.

Your specific question is stated as follows:

"* * * whether in taking the number from the average vote cast for the auditor, sheriff and superintendent of schools, should the superintendent's vote be taken from the 1964 general election and the vote for the auditor and sheriff taken from the 1962 general election or should all of the votes be taken from the 1962 general election?"

This question does point up a problem in the interpretation of section 16-04-04 of the 1965 Supplement to the North Dakota Century Code in future years.

We note that section 150 of the North Dakota Constitution (Page 22 of the 1965 Supplement to the North Dakota Century Code, Volume 13) provides:

"SECTION 150. A superintendent of schools for each county shall be elected every four years beginning in the year 1964, whose qualifications, duties, powers and compensation shall be fixed by law." (Underscoring ours.)

We note further that section 173 of the North Dakota Constitution (Page 23 of the 1965 Supplement to the North Dakota Century Code, Volume 13) provides as follows:

"SECTION 173. There shall be elected in each county, organized under the provisions of section 172 of the Constitution of the State of North Dakota, a register or deeds, county auditor, treasurer, sheriff, state's attorney, county judge and a clerk of the district court, who shall be electors in the county in which they are elected and who shall hold their office for a term of four years and until their successors are elected and qualified; provided in counties having fifteen thousand population or less, the county judge shall also be clerk of the district court; provided further that in counties having population of six thousand or less the register of deeds shall also be clerk of the district court and county judge. This amendment shall be construed as applying to the officers elected at the general election in 1962. This amendment shall

be self-executing, but legislation may be enacted to facilitate its operation." (Underscoring ours.)

The precise language of section 16-04-04 of the 1965 Supplement to the North Dakota Century Code in this regard is as follows:

"* * * If no candidate was elected or votes cast for an office at the last general election, a petition shall be deemed sufficient if it has the number of signers equal to the number of the foregoing percentage requirements applied to the total average vote cast for the offices of sheriff, superintendent of schools and county auditor at the last general election in such county or district as the case may be, such average to be arrived at by dividing the total vote cast for said offices in such county or district as the case may be by three. * * *."

On the basis of the above, it would appear that in the usual instance a sheriff and county auditor were not elected in the year 1964 but a superintendent of schools was. It would likewise appear that in the usual instance a sheriff and county auditor were elected in the year 1962. On such basis, it is our opinion that the above quoted statutory provision must be construed in accordance with its terms, i.e., the appropriate figures be taken from the last general election, further construed as last general election at which such officers ran. Taking the total vote cast for the offices of county auditor and sheriff in 1962 and the total vote cast for the superintendent of schools in 1964 would give a base figure entirely in keeping with the current statutory provision. Also, where a petition is submitted containing a number of valid signatures equal to the appropriate percentages as applied to the total vote cast for all three officers in the 1962 election, same should properly be deemed sufficient. We do not believe that a construction of the statute applying same in such manner as to consider only the votes cast for the office of superintendent of schools in 1964 on the theory that this was the only office voted for at the last general election is justified either by the letter or the spirit of the statute.

To conclude, it is our opinion that a petition should be deemed sufficient if it has a number of signers equal to the lower of:

1. The percentage requirements applied to the total average of votes cast in the 1964 election for county superintendent of schools, plus the votes cast in the 1962 election for sheriff and county auditor, or
2. The percentage requirements applied to the total average vote cast in the 1962 election for all three offices.

HELGI JOHANNESON

Attorney General